Supreme Court, U.S.
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No. 95-1065

In The

Supreme Court of the United States

October Term, 1995

REVEREND PAUL SCHENCK and
DWIGHT SAUNDERS,

Petitioners,

v.

PRO-CHOICE NETWORK OF
WESTERN NEW YORK, ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the en banc U.S. Court of Appeals for the Second Circuit has properly applied the standard established in *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994), to the particular record of obstructive and harassing conduct in this case.

STATEMENT UNDER RULE 29

Respondents are as follows: Pro-Choice Network of Western New York, a not-for-profit membership corporation; Buffalo GYN Womenservices, P.C.; Erie Medical Center; Paul J. Davis, M.D.; Barnett Slepian, M.D.; Morris Wortman, M.D.; Highland Obstetrical Group, P.C.; Alexander Women's Group. None of the respondents are publicly held companies, and no respondent has a parent company or any wholly-owned subsidiaries.

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OPINIONS BELOW

The only opinion involved in the Petition for a Writ of Certiorari is the *en banc* decision of the U.S. Court of Appeals for the Second Circuit entered on September 28, 1995 and published at 67 F.3d 377 (2d Cir. 1995). In an order dated December 27, 1994 the Second Circuit granted rehearing *en banc* limited to two aspects of an earlier panel decision entered on September 6, 1994: Whether two provisions of a preliminary injunction issued by the U.S. District Court for the Western District of New York were consistent with the First Amendment to the U.S. Constitution. In its *en banc* decision the Second Circuit affirmed the district court. (Petitioners mistakenly characterize the decision as reversing the panel; while that may have been its practical effect, legally the Court was reviewing not the panel decision, but the district court decision.) Since the original panel decision had affirmed the district court in all respects except the two contested provisions of the preliminary injunction, the combined effect of the *en banc* decision and the remaining valid portions of the original panel decision was to affirm the district court *in toto*.

The only portions of the preliminary injunction challenged by Petitioners are the two provisions examined and affirmed by the *en banc* Second Circuit. Thus, the only opinion below for which Petitioners seek a Writ of Certiorari is the one published at 67 F.3d 377 (2d Cir. 1995).

STATEMENT OF THE CASE

Respondents submit this Brief in Opposition in response to the Petition for a Writ of Certiorari submitted by Petitioners. This Brief provides Respondents' reasons for denying the Writ, and corrects Petitioners' mischaracterization of the actual record developed below, as well as of the scope and effect of the preliminary injunction provisions for which they seek review.

A. Procedural History

Plaintiffs-Respondents adopt the full statement of the procedural history and facts set forth in the district court opinion, 799 F. Supp. 1417 (W.D.N.Y. 1992) (Pet. App. E, pp. A-138--154), and in the Second Circuit, 67 F. 3d 377, 381-386 (Pet. App. A, pp. A-1 - A-16). Several aspects bear emphasis, because Petitioners have given a misleading or inaccurate account.

Plaintiffs-Respondents are several health care providers in Buffalo and Rochester, N.Y. who offer abortions and other gynecological and reproductive health care services, and the Pro-Choice Network of Western New York, an organization whose purpose is to ensure continued access to safe reproductive health care. The offices of several of the Respondents are located in medical office buildings or in full service hospitals; thus, any demonstration activity outside disrupts not only their health care services, but also that of all of the medical providers. At several of the facilities, on any given day, defendants might be impeding and endangering not just women seeking abortions, but women seeking pre-

natal care for wanted but high-risk pregnancies, women seeking pap smears, people coming to visit their dentist, cardiologist, oncologist, psychologist, or ill loved-one.

Defendants, including the two Petitioners, include organizations and individuals dedicated to disrupting the provision of abortion services through blockades, or "rescues," and a variety of other demonstration techniques designed to impede access to health care facilities and harass their patients and staff. As they admitted in their Answer, all individual defendants had at least one prior arrest and conviction for participating in blockades, trespasses, or incidents in which demonstrators chained themselves together inside the offices of the plaintiffs. The complaint chronicled a series of such blockades at Buffalo and Rochester facilities from 1988 through 1990. Threatened with a published announcement of another such blockade on September 28, 1990, plaintiffs filed on September 24, 1990 a complaint stating one federal and six state law causes of action, and seeking injunctive relief from the threatened blockade and the other types of disruptive activity in which defendants' repeatedly engaged.

The district court granted a temporary restraining order on September 27, 1990, and defendants complied by refraining from a full-fledged blockade the following day. But for Petitioners to now contend before this Court that this is not a "rescue" case because there were no blockades at the Plaintiff facilities before the preliminary injunction issued (Pet. p. 5) defies reality and ignores the complaint and the

reason for granting the TRO.[1] The history of frequent, persistent blockade activity is an important *raison d'etre* for this case and both the TRO and the preliminary injunction.

By stipulation of the parties the TRO remained in effect until the district court could decide the motion for a preliminary injunction. The TRO was less than a month old, however, before plaintiffs filed contempt motions against two defendants, alleging violations. Shortly thereafter, plaintiffs filed two more contempt motions against three additional defendants, including Petitioner Paul Schenck, for three different occasions. Hearings on these contempt motions were held on various days from February, 1991 through January, 1992, and all defendants were found in violation. The evidence adduced at these hearings was included in the record before the district court when ruling on the motion for a preliminary injunction. The contempt violations included conduct such as standing in front of and impeding cars trying to enter a clinic driveway and pinning a patient escort up against a doorway (Schenck); trespassing on a clinic parking lot and impeding and harassing people trying to get to the

[1] It is also doubly disingenuous for Petitioners to contend that no part of this case involves blockades, because shortly after the preliminary injunction was entered, for two weeks in April and May, 1992 defendants and hundreds of others engaged in massive blockades of Buffalo clinics. These events, known as the "Spring of Life," resulted in over 600 arrests, and criminal contempt guilty pleas by five blockade leaders for violating the preliminary injunction. This ongoing thwarting of the preliminary injunction figured prominently in the district court's decision not to vacate it, 828 F. Supp. 1018 (W.D.N.Y. 1993), a decision affirmed by the Second Circuit panel.

clinic; stalking patients for the length of a block as they tried to make their way to a clinic, impeding, crowding, and harassing them to tears while ignoring increasingly agitated pleas to be left alone.

The district court also held a preliminary injunction hearing from March 6, 1991 through April 1, 1991, at which numerous witnesses testified to a pattern of ongoing obstructive, harassing, and intimidating activity by defendants, both prior to and after the entry of the TRO. The district court granted a preliminary injunction on February 14, 1992, and an appeal followed that eventually resulted in the Second Circuit decision involved in the Petition.

On September 6, 1994 a panel of the Second Circuit, by a 2-1 vote, affirmed most of the preliminary injunction but struck down two provisions. Respondents filed a Petition for Rehearing En Banc limited to these two contested provisions, and the Second Circuit granted rehearing. The case was briefed and argued anew, and on September 28, 1995, by a 13-2 vote, the *en banc* Court affirmed these two aspects of the preliminary injunction. The majority opinion, written by Judge Oakes, commanded 9 votes. An opinion written by Judge Winter garnered 10 votes, including 6 of the judges who joined the Oakes opinion for the Court. The Winter opinion is designated as a concurring opinion. Judge Jacobs, joined by Judge Mahoney, both of whom also joined the Winter opinion, concurred separately. Judges Meskill and Altimari, the two votes from the original panel, dissented. This Petition seeking review of the *en banc* decision followed.

B. Statement of Facts

The district court opinion and the *en banc* Second Circuit opinion contain full statements of the facts. But, because Petitioners so studiously ignore or misrepresent the record, several aspects of the evidence and findings are worth repeating here.

Petitioners assert that the injunction was issued "in absence of a showing that access to the facilit[ies] [was] impeded." Pet. p. 10. But the district court found that in addition to the numerous occasions of blockade activity admitted by defendants, see 799 F. Supp. at 1424, Pet. A-146, defendants also engaged in "constructive blockade" activity that was just as impeding and threatening to health and access as full-fledged blockades. The court found that defendants "frequently and routinely congregate in or near the driveway entrances to the facility parking lots in order to impede and obstruct access...", and that the "numerous demonstrators in the driveway entrances intimidates and impedes the drivers of cars seeking access ... and creates a danger to both the occupants of the cars and the demonstrators themselves. ... On some occasions, the drivers and occupants of the cars trying to enter the clinic parking lots are so intimidated or confused by the demonstrators that they leave the area thereby causing those occupants seeking health care to suffer a delay in obtaining such care." *Id.*

In addition, the court found that demonstrators often throng around pedestrians entering or leaving the facilities "in an intimidating and obstructing manner, and grab, push and shove the patients, patient escorts and staff. This activity

causes stress and even physical injury to the patients, patient escorts and medical staff, and disrupts the atmosphere necessary for rendering safe and efficacious health care." *Id.*

The district court also found that when targets decline the attentions or leaflets of demonstrators, the so-called "sidewalk counselors" then get extremely frustrated, and degenerate to yelling at, badgering, intimidating, following and crowding their unwilling targets. The district court also found that the sidewalk counselors almost never respected the wishes of targets to be left alone to walk away in peace. One witness who had been the victim of this sort of behavior described the experience as "like being in the middle of a lynch mob." Another witness, a patient escort, who observed such harassment regularly, characterized it as a "feeding frenzy" around terrified, "absolutely vulnerable" people "engulfed by a large group ... and caught and forced to sort of stand and listen to all of this."

These actual findings, which were supported by substantial and uncontradicted testimony, some of it out of the mouths of defendants' own witnesses, paint a much different picture than the misleading impression portrayed by Petitioners. Far from constituting the "peaceful, non-violent, non-obstructive" speech activities alleged by Petitioners, the record and findings show that impeding, intimidating, and harassing demonstration activity that obstructed traffic and threatened health was the norm, even after the TRO.

The record is also replete with evidence of extensive health risks stemming from defendants' conduct. While Petitioners state that there was no medical testimony, Pet. p.

29, quite the opposite is true. Plaintiffs put on four doctors, one nurse, one expert in behavioral medicine who was not affiliated with any of the parties, and one trained counselor who worked with patients inside the clinics. They all described health risks caused by defendants' intimidating, obstructing, and harassing activities, ranging from delayed surgery or post-surgical appointments, hyperventilation, elevated blood pressure, thrashing on the operating table, and a reduced ability to hear essential health care information. Even defendants put on a doctor, who agreed that delayed abortion procedures presented elevated medical risks. The expert in behavioral medicine, Dr. Alice Hoagland, testified that when unwanted strangers perceived as threatening come within twenty-five feet or less of someone going in for surgery or other medical care, this causes a physical stress reaction. These adverse physical reactions include heightened blood pressure, an immunosuppressive response that may lead to a greater risk of infection, and a reduced ability to absorb and comply with medical instructions. This testimony provides ample support for both challenged injunction provisions.

C. The Injunction Provisions At Issue

The entire preliminary injunction is reprinted in the Petition Appendix at A-33 -- A-37. Only two provisions are at issue, paragraph 1(b), and a portion of paragraph 1(c). These contested provisions enjoin Petitioners and other defendants from:

> "(b) demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities, or within fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by not more than two persons as specified in paragraph (c) shall be allowed;
>
> (c) ... provided, however, that sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility. ..."

These paragraphs are known as the "buffer zone" and "cease and desist", or "right to walk away" provisions. Petitioners overdramatically claim that these provisions bar all speech on the public sidewalk, and require them to cease

all "counseling" activity once rebuffed. This characterization is patent nonsense.

The buffer zone simply establishes a small area around entrances, cars, and people in order to preserve access and reduce intimidation and physical or visual obstruction of entrances. Its size is less than two car lengths, or approximately the amount of space a car needs to safely turn into a driveway, or the amount of space a person needs to see where a doorway is and to not feel crowded or intimidated from proceeding. This buffer zone is narrower than the 36 foot buffer zone upheld by this Court in *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994), because that zone had the effect of putting demonstrators completely across the street from the targeted clinic. It also did not allow any defendant to intrude into the buffer zone. Here, in contrast, sidewalk counselors can come within the buffer zone to attempt face to face leafletting or conversation. At every plaintiff facility there remain ample areas of the sidewalks or grassy strips immediately adjacent to the facilities open for demonstration activity, placard-carrying, leafletting, chanting, praying, singing. Virtually no one can traverse the sidewalk next to a clinic without encountering the demonstrators. The demonstrators and their signs remain readily visible and audible to passersby and vehicles and pedestrians coming in to or leaving the facilities.

Under the cease and desist, or right to walk away provision, a sidewalk counselor remains free immediately to turn to anyone else on the sidewalk or driving up to leaflet or talk to them. They remain free to continue to direct words at the original unwilling target from the distance of fifteen

feet, a distance which means that some of their words are still likely to be audible to the target. The only things that defendants cannot do are stalk too closely to an unwilling target, to continue to attempt a face-to-face encounter with them, or refuse to let them pass in peace. Basically, what this provision means is that defendants may try to engage with anyone, even those who don't want an initial encounter, but they have to respect the right of people to refuse their message and walk away. It is narrowly tailored to the evidence in the case, which provided extensive illustrations of how defendants repeatedly intimidated, yelled at, badgered, got in the face of, and crowded around or stalked people who begged to be left alone.

This provision is significantly narrower than the "no approaching anyone within 300 feet of the clinic" proscription struck down in *Madsen*. This Court found that provision too broad because it protected the willing as well as the unwilling listeners, and afforded demonstrators no practical opportunity to try to persuade people. Thus it inevitably swept up in its ambit some peaceful, welcome, communication. Here, there is an unfettered right to approach, even hard by an entrance. The "walk away" requirement applies only once a target indicates, verbally or non-verbally, that they wish to be left alone, and then it only requires the demonstrator to back away a modest distance that still leaves them visible and audible to the target. Since there is no First Amendment right to press one's message or close physical proximity on an unwilling listener, *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970); *Frisby v. Schultz*, 487 U.S. 474 (1988), this injunction provision does not even restrict any protected speech.

REASONS FOR DENYING THE WRIT

In essence, this Petition attacks the reasoning and holding of this Court's recent decision in *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994). There is no reason to review the *Madsen* decision -- it is less than two years old, this is the first federal circuit court decision applying it, there is no conflict with subsequent circuit or district or state court decisions, and nothing else has happened to call into question the propriety of that holding.

To the extent this Petition is not a wholesale attack on the concept of buffer zones or the recognition of a government interest in healthy and safe access approved in *Madsen*, then it is no more than a quibble about the application of *Madsen's* standard to a particular record. The Supreme Court's resources are far too precious to get involved in a routine fact-based dispute about how its general precepts get applied to future concrete cases. Moreover, since the Second Circuit was faced with a record of obstruction, intimidation, health risks, and contempts at least as or even more compelling than the record in *Madsen*, and approved less speech-restrictive injunction provisions, its decision is undoubtedly meritorious.

I. There is No Reason to Revisit *Madsen* So Soon and There is No Conflict Among Lower Courts

Many of Petitioners' arguments attacking the present

injunction are actually challenges to the *Madsen* decision itself, insofar as what Petitioners really seem to be challenging is the very idea of a buffer zone. For example, Petitioners complain that the buffer zone in the present injunction keeps them off a 15 foot portion of public sidewalks. Yet, they assert, they have a constitutional right to demonstrate anywhere they please on any sidewalk. Pet. p. 20. *Madsen* squarely rejected this proposition, and upheld as sufficiently narrowly tailored to protect significant governmental interests a broader injunction that kept the demonstrators completely off the sidewalks adjacent to the Florida clinic.

In addition, Petitioners complain that the court below considered governmental interests other than securing access to the targeted facilities and public safety; in particular, Petitioners are aggrieved that the lower courts considered a governmental interest in reducing medical risk and protecting the psychological and physical medical safety of people seeking to obtain or render health care. Pet. Pt. IIA, pp. 21-24. In *Madsen*, however, this Court held that the governmental interests implicated by anti-abortion protest activity targeted at clinics or hospitals and people seeking access to them go beyond protecting access and the free flow of traffic. *Madsen* also recognized as significant the governmental interest in protecting "not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." 114 S. Ct. at 2526. In addition this Court characterized as significant the governmental interest in protecting "a woman's freedom to seek lawful medical or counseling services." *Id.*

Petitioners also challenge *Madsen* itself when they challenge the lower court's finding that the injunction is content-neutral because its restrictions are justified "without reference to the content of the regulated speech." *Id.* at 2523. *Madsen* held that a very similar injunction, supported by identical governmental interests, and issued in response to a remarkably parallel pattern of conduct, was content neutral.

There is no reason for this Court to grant a Writ that essentially seeks review of such a recent decision as *Madsen*. There have been no changes in First Amendment doctrine in the last year that suddenly call *Madsen's* soundness into question. Nor has the case had sufficient time to percolate among or be called into question by the lower courts; the Second Circuit decision in this case was the first abortion protest injunction case resolved by a federal circuit court after *Madsen*. Moreover, lower courts do not appear to be having any difficulty applying the *Madsen* standard, and there is no conflict among the Circuits or among state courts about the meaning or application of *Madsen*.

While there have been variations in the injunctions or ordinance provisions approved by lower courts, that is to be expected, since *Madsen* mandates a fact-specific inquiry and a tailoring of each injunction to its particular record. Lower federal courts and state courts are in harmony, however, on two fundamental points: 1) that buffer zones of various sizes and scope are permissible after *Madsen*; and 2) that some protection for people seeking access or leaving clinics from the duress of unwanted proximate encounters with demonstrators is warranted so long as all approaches outside the buffer zone are not barred. *See, e.g., Sabelko v. City of*

Phoenix, 68 F.3d 1169 (9th Cir. 1995) (upholding ordinance providing that within 100 fett access area to health care facilities, demonstrators must withdraw eight feet away from people who request to be left alone); *Fischer v. City of St. Paul*, 894 F. Supp. 1318 (D. Minn. 1995) (upholding police action fencing off sidewalk in front of clinic in response to threat of Operation Rescue demonstration, based on proven obstruction and disruption of other Operation Rescue events); *United States v. Dinwiddie*, 885 F. Supp. 1286 (W.D. Mo. 1995) (injunction under Freedom of Access to Clinic Entrances Act, erecting buffer zone that pertained to particular demonstrator with history of threatening actions; defendant allowed to come into buffer zone for purely peaceful, non-intimidating or obstructive leafletting or conversation); *Planned Parenthood of Shasta Diablo v. Williams*, 43 Cal. Rptr.2d 88, 898 P.2d 402 (1995) (on remand from Supreme Court after *Madsen*, upholds injunction with buffer zone requiring demonstrators to stand across the street, a distance of 60 feet); *Horizon Health Center v. Felicissimo*, 282 N.J. Super 325, 659 A.2d 1387 (App. Div. 1995) (buffer zone running along length of sidewalk adjacent to clinic; 2 sidewalk counselors allowed within zone, but must stop counseling when target indicates desire to be left alone).

Thus far, after *Madsen*, the court decisions, including that of the Second Circuit, are consistent with each other as well as with this Court's ruling: buffer zones adapted to the particular record and sites are acceptable, and people have the right to be left alone or to be free of unwanted targeted "counseling", and demonstrators can be required to stop such targeted, closely proximate demonstration activity.

II. This Case Rests on Its Particular Facts and Presents No Novel or Unsettled Constitutional Issues

To the extent that the Petition is not attacking the conclusions of *Madsen*, it does no more than question how the Second Circuit applied the *Madsen* standard to the particular record before it. Petitioners seem affronted that the two challenged injunctive provisions differ somewhat from those in *Madsen*. Yet that is to be expected if courts engage in the necessary tailoring to the record.

Madsen established the First Amendment legal standard to be applied to injunctions, and this case presents no new First Amendment issues unaddressed in *Madsen*. Every post-*Madsen* abortion protest injunction case will turn on its facts, and this Court's resources are too precious to become the arbiter of the adequacy of every particular record. The question of the extent to which the record of obstruction and harassment and harm to health and safety in this case is similar to or even more compelling than the record in *Madsen*, while carefully assessed by the Second Circuit, is not worthy of this Court's supervision.

The lack of need to review the sufficiency of the record supporting the present injunction is all the more apparent because of the strong parallels between this record and that in *Madsen*. In both cases, the demonstrators frequently impeded access by congregating in driveways or marching slowly across them, causing cars to slow down or making it difficult for drivers to see the entrance. In both

cases, there was ample evidence that demonstrators targeted people seeking to enter or leave, accosting and yelling at them at close range, creating an abusive "gauntlet" that people would have to run if they wanted to go into a clinic. And, in both cases, the evidence established that these activities of impeding, intimidating, yelling at, and stalking increased medical risks and caused physical and psychological harm to the targets. *Cf.* 799 F. Supp. at 1424-25; 67 F.3d at 388; 114 S.Ct. at 2521. In both cases, the trial courts found that the obstructive and intimidating activity did not abate despite prior injunctive orders.

In addition, in certain key respects the record in the present case is even stronger than *Madsen's*. Here, several individuals were found in contempt for violating the TRO, some on multiple occasions, yet even these enforcement proceedings did not alleviate the problem. There were no contempt adjudications in *Madsen* between the initial injunction and the subsequent more restrictive order. Moreover, here there was a history of full-fledged massive blockades and "chain-gang" invasions of the clinics, and all defendants had been arrested or convicted for such activity. In contrast, in *Madsen*, defendants stipulated that they had never previously blocked access to abortion clinics in the vicinity.

III. The Second Circuit Decision is Consistent with Established First Amendment Law

A final reason for denying the Writ is that the Second Circuit decision is entirely consistent with *Madsen* and

numerous other well-established First Amendment principles. First, in finding the injunction content-neutral, the Second Circuit correctly found that because the injunction is justified "without reference to the content of the regulated speech," it is content-neutral. No provision of the injunction turns on or is directed at any particular message -- it is directed entirely at Petitioners' conduct. It directs where and how they may demonstrate, it directs them not to make excessive noise, it directs them to respect people's right to refuse and to walk away, and it directs them not to grab, push, shove, crowd, obstruct or impede. The governmental interests underlying the injunction -- preserving access and the free flow of traffic, public safety, securing medical safety and privacy, and protecting targeted captive audiences from duress -- are all well established and specifically approved as valid, content-neutral objectives in *Madsen*.

Petitioners' argue that because their targeted, face-to-face encounters with unwilling people were proven to cause stress and increased medical harm, the purpose of preventing this harm somehow makes the injunction directed at the content of their message. Preventing stress and anxiety to vulnerable targets, they argue, cannot be a content-neutral government purpose. *Madsen* directly repudiates this argument, as do *Frisby v. Schultz*, 487 U.S. 474 (1988); and *International Society for Krishna Consciousness v. Lee*, 505 U.S. ---, 112 S. Ct. 2701 (1992).

No part of the "cease and desist" or "right to walk away" provision is directed at the content of a message; it is aimed solely at the intrusive, intimidating, and impeding conduct of the messenger. No part of the message the

"counselor" seeks to impart is abridged. Once a counselor is rebuffed, she is free to continue imparting any message she wishes from fifteen feet away. All she is prevented from doing is physically confronting people at close range, persistently foisting her unwanted presence on people who want to get away, badgering them, and following too closely. None of this, as the Winter concurring opinion correctly noted, is protected conduct or speech, and it is all independently proscribable as harassment, stalking, tortious assault or intentional infliction of emotional distress. Judge Winter was summarizing well-established, unquestioned legal principles when he noted that "there is no right to invade the personal space of individuals going about lawful business, to dog their footsteps or chase them down a street, to scream or gesticulate in their faces, or to do anything else that cannot fairly be described as an attempt at peaceful persuasion." 67 F.3d at 396.

By attacking the "cease and desist" or "walk away" requirement, what Petitioners are really asserting is that they have a First Amendment right to get in someone's face and to stay in their face whether the target wants it or not. But of course, there is no such First Amendment right to close physical proximity to unwilling targets. Rather, in this instance, it is the unwilling targets who have a countervailing First Amendment right to refuse and to be left alone.

There is no First Amendment right to press ideas on unwilling listeners, and "the right of every person to be let alone must be placed in the scales with the right of others to communicate." *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736 (1970). There is no First Amendment right to

obstruct people's passage along a street or sidewalk and refuse to let them pass in peace unless they take a leaflet or listen to a message. *Cox v. Louisiana*, 379 U.S. 536 (1965); *Schneider v. State*, 308 U.S. 147 (1939). Moreover, where, as here, the targeted, unwilling recipients are held captive by medical circumstance, the well-established captive audience doctrine, correctly applied by the Second Circuit, warrants the restrictions in this injunction. *Madsen*, 114 S. Ct. at 2526; *Frisby v. Schultz*, *supra*; *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530 (1980); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Kovacs v. Cooper*, 336 U.S. 77 (1949). *Cf. Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) (governmental interest in maintaining calm, stress-free atmosphere necessary for health care justifies total ban on union solicitation in any areas of hospital where patients or their companions may be).

The preliminary injunction affirmed by the Second Circuit is a narrowly tailored and carefully balanced effort to respect the rights of both anti-abortion demonstrators and people seeking lawful medical care or other business at the targeted clinics, medical office buildings, or hospitals. It gives the Petitioners and their fellow defendants ample opportunity to protest along most of the sidewalks alongside clinics, and to approach people in an attempt to communicate with them. It requires them merely to keep a fifteen foot area around entrances, cars, and people going in or out clear, in light of the extensive amount and type of obstructive activities they had engaged in. Moreover, while they are free to insert "sidewalk counselors" within this buffer zone in order to attempt face-to-face encounters, the injunction then acknowledges the right of the targeted people to refuse the

encounter and to walk away without molestation or badgering.

There is no need for this Court to exercise its supervisory powers to review such a narrow and balanced injunction already found constitutional by fourteen federal judges. To do so would be purely an academic exercise.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Dated: February 1, 1996

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